Supreme Court of the United States.

No. 42.—October Term, 1904.

Otto Olsen, Plaintiff in Error, vs. A. D. Smith, L. Huth, L. Best, et al. } In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

[November 28, 1904.]

Mr. Justice White delivered the opinion of the Court.

The defendants in error, who were plaintiffs in the court of original jurisdiction, as the duly licensed State pilots of the port of Galveston, Texas, sued in a Texas District Court to recover the damages averred to have been caused them by the alleged illegal action of the defendant in offering, when he was not authorized by law to do so, his services "to pilot sail vessels or registered steamers, bound to or from foreign ports, in or out of the port of Galveston." An injunction was prayed restraining the defendant from acting "in any manner as branch or deputy pilot, or pilot under the laws of the State of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified." The defendant filed a general demurrer, and, reserving the demurrer, answered, raising special defenses based on averments that the pilotage laws of Texas were in conflict with the Constitution and laws of the United States. The court overruled the demurrer of the defendant, and, on the ground that no defense was stated, sustained a demurrer to the answer. A judgment was entered in favor of the plaintiffs, awarding an injunction as prayed. (68 S. W. Rep. 320.) The case was taken to the Court of Civil Appeals for the First Supreme Judicial District, was thence transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District, where the decree below was affirmed, with a slight modification not necessary to be stated. The Supreme Court of the State having declined to review the action of the Court of Civil Appeals, this writ of error was prosecuted to the latter court.

The defenses raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the State of Texas had power to enact laws regulating pilotage in the ports of that State; and, second, if such power existed, whether the provisions of the State statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain pro-

visions of such a character as to cause them to be repugnant to the Fourteenth Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce. Briefly, the pilotage laws of the State of Texas provide as follows: The governor is authorized to appoint for each port, whose population and circumstances shall warrant it, "a board of five persons of respectable standing, to be known as commissioners of pilotage." Upon this board power is conferred to fix, within the maximum limits provided by law, the charges to be made by branch and deputy pilots for their services, to regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter. Upon the governor is conferred the authority to appoint such number of branch pilots as may from time to time be necessary, each of whom shall hold office for two years, subject to removal by the governor at pleasure, and any one who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots. (Revised Statutes of the State of Texas for 1895, articles 3790, 3791, 3792, 3793, 3794, 3796 and 3803.) The maximum rates of pilotage are provided for as follows:

"The rate of pilotage on any class of vessels shall not, in any port of this State, exceed four dollars for each foot of water which the vessel at the time of piloting draws, and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside of the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot whose services she so declined, for the payment of half pilotage; and any vessel which, after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or, if she has come in without the aid of a pilot, though offered outside, she shall, on so going out, be liable for the payment of half pilotage to the pilot who had first offered his services before she came in, but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. . . ." (Article 3800.)

The vessels excepted from the operation of the foregoing provisions are thus stated in article 3801:

"The following classes of vessels shall be free from any charge for pilotage, unless for actual service, to wit: All vessels of twenty tons and under, all vessels of whatsoever burden owned in the State of Texas and registered and licensed in the district of Texas, when arriving from or departing to any port of the State of Texas; all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any part of the United States, when arriving from or departing to any port in the State of Texas; all vessels of seventy-five tons or under owned in the State of Texas and licensed for the coasting trade in the district of Texas when arriving from or departing to any port in the United States."

The first contention in effect is that the State was without power to legislate concerning pilotage, because any enactment on that subject is necessarily a regulation of commerce within the provision of the Constitution of the United States. The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although State laws concerning pilotage are regulations of commerce, "they fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject." (*Cooley* v. *The Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 237; *Wilson* v. *McNamee*, 102 U. S. 572.)

The second proposition relied on is that, albeit the State had power to legislate concerning pilotage until Congress acted, the State laws are void because in conflict with the laws enacted by Congress. This is based upon two provisions of the Revised Statutes of the United States, the one providing "that no regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States, and all existing regulations or provisions making any such discrimination are annulled and abrogated," (Rev. Stat. 437;) the other being the provision of the statutes, (Rev. Stat. 1444,) exempting coastwise steam vessels from the operation of State pilotage laws. Undoubtedly the exempting clause of the Texas statute is discriminatory, and is therefore void, because in conflict with the law of the United States. The court below so decided. It held, however, that the provisions discriminating in favor of Texas ships and ports were separable from the remainder of the statutes, and therefore the general regulations concerning pilotage were valid, although the discriminating provisions were eliminated. Whether the illegal clauses granting discriminatory exemptions could be eliminated without destroying the other provisions of the State laws regulating pilotage, is a State and not a Federal question. For the purpose of determining the validity of the statutes in their Federal aspect this court accepts the interpretation given to the statutes by the State court and tests their validity accordingly. (*W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466, and authorities there cited.) True it is in *Spraigue* v. *Thompson*, (118 U. S. 90,) a case involving the pilotage laws of Georgia, in the course of the opinion it was remarked (p. 94) that the ruling of the Supreme Court of the State of Georgia, that the illegal provision of the statute in question was separable, caused the statute "to enact what confessedly the legislature never meant." But this remark was not made the basis of the conclusion, since it was decided in that case that the pilotage charge in question was invalid, even under the

construction given by the Supreme Court of the State of Georgia to the State statute, because the exaction which was in controversy was in conflict with the provisions of the Revised Statute of the United States, exempting coastwise steam vessels from pilotage charges. In any event, it is apparent that the observation referred to, made in the case of *Spraigue* v. *Thompson*, has been qualified by the later decisions of this court to which we have previously referred.

Of course, whilst accepting the construction of the State court as to the divisibility of the statute, the duty yet remains, for the purpose of the Federal question, to determine whether the statute as construed is valid. As the effect of the construction below was to eliminate the discrimination from the statute, it is clear, in view of the power of the State to legislate concerning pilotage until Congress acts upon the subject, that the statutes, as interpreted below, were within the power of the State and not in conflict with any act of Congress. Indeed, it is obvious from the provisions of the Revised Statutes, (sec. 4237,) forbidding discrimination in State legislation concerning pilotage, that Congress did not intend by that section to revoke the power of the States on the subject or to abrogate existing pilotage laws of the several States containing discriminatory provisions, but only to abrogate the provisions making the discrimination. This results since the statute, after first generally prohibiting regulations by any State discriminating "in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States," in careful language annuls and abrogates only "all existing regulations or provisions making any such discrimination." And this construction of the section in question disposes also of the argument that if the statute be accepted as interpreted by the State court, it is nevertheless repugnant to the law of the United States, since, if the exceptions found in the State statute are eliminated, then those statutes impose pilotage charges upon all vessels, and hence subject coastwise steam vessels of the United States to such charges, although they are expressly exempted therefrom. (Revised Statutes, 4444.) But the provisions of that section clearly contemplated that by the existing State laws, coastwise steam vessels of the United States were subject to pilotage charges, and proposed, whilst withdrawing such vessels from pilotage charges, not in other respects to interfere with the State laws on the subject of pilotage. This is plainly the result of the following provision contained in the section in question:

"Nothing in this title shall be considered to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State."

Nor is there merit in the contention that, as the vessel in question was a British vessel coming from a foreign port, the State laws concerning pilotage are in conflict with a treaty between Great Britain and the United States, providing that "No higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States." Neither the exemption of coastwise steam vessels from pilotage, resulting from the law of the United States, nor any lawful exemption of coastwise vessels created by the State law, concerns vessels in the foreign trade, and, therefore, any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade. In substance the proposition but asserts that because by the law of the United States steam vessels in the coastwise trade have been exempt from pilotage regulations, therefore there is no power to subject vessels in foreign trade to pilotage regulations, even although such regulations apply, without discrimination, to all vessels engaged in such foreign trade, whether domestic or foreign.

It remains only to consider the contentions based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all State regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.

Affirmed.